

Testimony of

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on behalf of Center for Media Education and  
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on

S. 2326, the Children's Online Privacy Protection Act of 1998

before the

Subcommittee on Communications  
Committee on Commerce, Science, and Transportation  
United States Senate

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## SUMMARY

The Internet offers numerous possibilities for enhancing children's educational and cultural opportunities at home and in school. However, this new electronic world may hold peril as well as promise: the constant and increasing threats to privacy are likely to undermine the potential of this new medium. Children are an especially vulnerable group who lack the analytical abilities and judgment of adults; and due to their age and lack of experience, they can easily be unfairly exploited.

The Center for Media Education (CME) and Consumer Federation of America (CFA) support S. 2326, "The Children's Online Privacy Act of 1998." We commend Senators McCain and Bryan for introducing this important piece of legislation, and we urge the Subcommittee on Communications to vote to report the bill out of committee. We urge the Committee, however, to support some changes and clarifications.

By supporting this bill and the suggested changes, you have a unique and unprecedented opportunity to help shape our children's electronic future in a positive way. Without the protection that this bill offers, threats to privacy by online advertising and marketing targeted at children and youth are likely to increase and undermine the enormous educational and civic opportunities the Internet promises.

The recent efforts by some industry leaders to come up with a self-regulatory regime are laudable. However self-regulation will not be an effective safeguard for protecting children's privacy online. The FTC's recent report on online privacy demonstrates dramatically the failure of industry self-regulation to protect children's privacy online. Congress should act swiftly to develop a national policy for protecting the privacy of children and families in interactive media. S. 2326 can be a beginning to that process. Both CME and CFA would like to underscore our continued commitment to see that the privacy of all consumers – adults as well as children -- is protected in Cyberspace.



My name is Kathryn Montgomery. I am President and Co-founder of the Center for Media Education (CME). We are a national non-profit public interest organization based in Washington, D.C. dedicated to improving the quality of electronic media, especially on behalf of children and their families. The Center for Media Education works together with a broad coalition of child advocacy, education, health, and parents groups. Before coming to Washington, I was a professor of film and television at the University of California, Los Angeles. I have spent more than twenty years researching, analyzing, and writing about electronic media.

I appreciate the opportunity to testify before the Subcommittee today. I am testifying this morning on behalf of the Center for Media Education and Consumer Federation of America (CFA). CME and CFA have been working together for the past two-and-a-half years to urge the Federal Trade Commission (FTC) to develop safeguards for protecting children's privacy online.

CME and CFA are here today to speak in support of S.2326, "The Children's Online Privacy Act of 1998." We believe this legislation is necessary in order to enable the Federal Trade Commission to develop effective safeguards for protecting the privacy of children and their families on the Internet. We do believe, however, that some changes and clarifications of the bill are necessary.

CME has been monitoring and analyzing online marketing directed at children for more than three years. Our 1996 report, "Web of Deception," was the first documentation of abusive online marketing and data collection practices directed at children. The CME study generated widespread press coverage and triggered an investigation by the Federal Trade Commission (FTC) of online marketing practices. Our research revealed that many children's commercial Web sites use games, contests and offers of free merchandise to entice children to give up personal information about themselves and their families. Some sites use cartoon 'product spokescharacters' who ask children for their email addresses, which are subsequently used to communicate with children after they leave the site.<sup>1</sup> Based on this research, the Center for Media

Education, along with Consumer Federation of America, proposed a set of FTC guidelines in 1996 designed to prevent online commercial marketers from invading children's privacy.<sup>2</sup>

At FTC workshops over the last several years, industry representatives have repeatedly promised to address these problems through self-regulation. However, as the most recent FTC report so dramatically documented, industry self-regulation has failed to protect the privacy of children online. The FTC found that 89 percent of the children's sites surveyed collected personally-identifiable information from children; 46 percent of the sites did not disclose their information collection practices; and less than 10 percent provided for some parental control over the collection of information from their children. The vast majority of Web sites are gathering personal information from children, and there are very few safeguards in place to limit these widespread and egregious practices.<sup>3</sup>

The FTC has asked Congress for legislation to authorize it to develop rules for protecting children's privacy. The Center for Media Education and Consumer Federation of America believe that S. 2326 will provide the agency with the clear mandate and authorization it needs to develop carefully crafted rules. We believe that such rules must be put in place now, before the most manipulative and harmful practices become commonplace.

I would first like to outline some key points that underline CME and CFA's position on this matter. Then I will identify the most important provisions of S. 2326 and explain why we support them. For some of the provisions, I will discuss changes and clarifications that we believe are necessary in the proposed legislation.

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<sup>1</sup> "Web of Deception," along with other documents and reports related to online privacy, is available on CME's website at [www.cme.org/cme](http://www.cme.org/cme).

<sup>2</sup> *CME/CFA Guidelines and Policy Principles for the Collection and Tracking of Information from Children on the Global Information Infrastructure and Interactive Media*, [www.cme.org](http://www.cme.org).

<sup>3</sup> "Privacy Online: A Report to Congress," Federal Trade Commission, June 1998.

Children are not “little adults.” As research has documented, children lack the analytical abilities and judgment of adults, making them especially vulnerable to advertising and marketing.<sup>4</sup> Younger children do not always understand the intentions of others and often cannot distinguish advertising from other forms of content. For this reason, there is a longstanding tradition of safeguards in children’s television advertising. For example, under the FCC’s “no-host-selling” rule, a host of a children’s program may not market directly to children, since children put more credence into such authority figures.<sup>5</sup> The online medium poses even more potential threats to children. Because many young children do not fully understand the concept of privacy, they can be quite eager and willing to offer up information about themselves and their families when asked. Children also tend to be particularly trusting of computers, and thus more open to interacting with them.<sup>6</sup>

Parents want and need to be involved in the online collection of personal information from their children. This is especially the case with children under 13. In a recent survey conducted by Alan Westin, 85% of Net users rated collecting personal information about children - such as name, address, and telephone number - without parental consent as 'very serious'.<sup>7</sup>

Self regulation is not an adequate mechanism for protecting children's privacy online.

While the most recent efforts by some industry leaders to come up with a self-regulatory regime are laudable, CME and CFA do not believe that these voluntary approaches will be effective. Bad actors will have no incentive to comply with the rules, and good actors will be at a competitive disadvantage for compliance. Weak, self-regulatory guidelines allow companies to pay only lip

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<sup>4</sup> “Privacy Online: A Report to Congress,” p.12, Federal Trade Commission, June 1998.

<sup>5</sup> Campbell, A., Ads2Kids.com: Should Government Regulate Advertising to Children on the World Wide Web?, *Gonzaga Law Review*, Vol. 33:311-346, 1998.

<sup>6</sup> One online children’s service asked children in a survey who they trusted more, their parents or their computers. The majority of respondents said they put more trust in their computers. See “Web of Deception,” p. 7, Washington, D.C.: Center for Media Education, 1996.

<sup>7</sup> *E- Commerce and Privacy: What Net Users Want*, A survey of the American Public Conducted by Louis Harris and Associates, Inc., and Dr. Alan Westin, Sponsored by Privacy and American Business and Price Waterhouse Inc., June 1998.

service to parental involvement. For example, the Website for BombPops<sup>8</sup>, a popular popsicle, urges children to communicate with the product spokescharacter, the Blue Bunny, giving up their names, address, age, and email, along with their favorite kind of ice cream. While the Website asks children under 12 to “please get your parents’ permission before you enter your full name or address,” no effort is made to secure verifiable parental permission. When a child indicates he/she is under twelve, the Website allows that child to provide all of the personal information asked for.

Solutions proposed in some self-regulatory regimes, such as disqualification from membership in a trade association or from using a certifying seal, would be insufficient to protect consumers. A trade association that is financed by its members has little incentive to expel a member who violates stated privacy policies. In addition, when consumers access sites online, they have no knowledge of how that company is viewed by its peers. Similarly, the absence of a certifying seal is too subtle a means of educating Internet users, particularly children. The action of a handful of companies will not create a safe online environment for children. Legislation is needed to ensure a level playing field and to require that all marketing Web sites directed at children conduct their business fairly.

Without effective government safeguards, marketers are likely to develop even more sophisticated methods of obtaining detailed personal information from children online. The Internet has an unprecedented ability to invade individual privacy. The emerging model of E-commerce is built on the concept of “one-to-one marketing,” which involves creating detailed personal profiles that are used to “microtarget” individual consumers. The interactive nature of the online medium makes it possible to obtain not only name, address, email and other personally identifiable information voluntarily, but also to track every move that an individual child makes

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<sup>8</sup> <http://www.bombpop.com>, visited 9/22/98.



online, including his/her response to various kinds of marketing and advertising appeals, or the kinds of Web pages that person accesses. Elaborate “psychographic” and other profiles can be created by merging the information obtained online with other information gathered from offline sources.<sup>9</sup> All of these trends underscore the need for clear, enforceable safeguards now to protect children and families.

The Federal Trade Commission needs the flexibility to track trends, and ensure that the rules fit changing practices. It is important that the legislation provides the Federal Trade Commission with enough flexibility to develop rules that will be effective in this rapidly changing online medium. The Commission must not be locked into rigid legislation that will prevent the agency from responding to changing industry practices.

CME/CFA support S. 2326 because it would mandate important privacy safeguards. It would require commercial Web site operators to :

Provide clear notice of the information collection and use practices.

Obtain verifiable parental consent prior to collecting personal information from children under thirteen. (opt-in)

Provide parents of children under thirteen with access to the child's personal information and the opportunity to correct, prevent or curtail further use of the information.

Require the commercial Web site operator to ensure data quality and security.

The bill also allows for ‘safe harbors’ - a provision that essentially allows self-regulatory bodies to implement and enforce their own guidelines, as long as the Federal Trade Commission (FTC) has approved the guidelines and found them to be in compliance with the regulations.

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<sup>9</sup> See, for example, the services that Engage ([www.engage.com](http://www.engage.com)), a company owned by CMG Information Services, offers.

Furthermore, in addition to FTC enforcement the bill allows State attorneys general to bring civil actions against violators of FTC regulations.

In addition, however, S. 2326 must include the following changes and clarifications:

**Notice.** CME/CFA believe that marketers should limit the amount and detail of personal information collected from children. However, if information is collected, information collectors/trackers must provide adequate notice before collecting/tracking personally-identifiable information from children. Without adequate notice, consent is meaningless, because users do not understand that they are agreeing to reveal information about themselves. S. 2326 requires such notice. We believe the notice must be prominently displayed, and easily seen and understood by anyone visiting the site. Sites should disclose information about who is collecting information, what information is being collected, and how it will and will not be used. Adequate notice must include a statement that valid parental consent is required before personally-identifiable information is collected. Users must also be informed of their rights, including procedures for correcting or limiting the use of previously-collected information.

**Consent.** CME/CFA believe that children cannot be asked to exercise “choice” and that information collectors/trackers must involve parents or guardians in this process. S. 2326 requires that Web sites directed at children under 13 to obtain verifiable parental consent. We support this provision. For this provision to be truly effective, information collectors/trackers must obtain prior valid parental consent whenever personally-identifiable information is collected from children under the age of 13. This consent must be obtained at points of promotion and transaction, as well as all other points where information is collected, and must be valid only for the information practices described in the disclosure. Because children can be easily manipulated, information collectors/trackers must obtain parental permission and adopt this “opt-in” approach. Opt-in ensures parental involvement and places the burden for obtaining consent on the party who

wants the information.

**Protections for Teenagers.** CME/CFA believe that the bill must provide adequate and age-appropriate privacy protections for teenagers (13-16). Teenagers are a vulnerable age group that deserves protections from data collectors. Teenagers are a very lucrative market and highly sought after by data collectors (The Alliance for Converging Technologies estimates that American preteens and teens spend directly \$130 billion and influence the spending of upwards of \$500 billion, Wall Street Journal, 3/3/98). CME believes that teenagers are still highly impressionable and less likely than adults to foresee the consequences of their actions. Teenagers do not suddenly become more privacy savvy once they turn 13.

At the same time, however, teenagers do have some privacy rights of their own vis-a-vis their parents. We agree with other organizations that do not want to require Web sites to notify parents when teens supply personal information online. But we do believe that teens are entitled to fair information practices and that requiring such practices will help ensure that these young people become thoughtful, responsible consumers. At the very least, the bill must provide teenagers directly with: notice, opt-in, access to information already collected, and opportunity to correct, prevent or curtail the use of personal information. The provision as proposed by CME would provide families and teenagers with heightened protections from privacy invasions.

**Use of E- mail.** CME/CFA believe that the bill should clarify that a child's (under thirteen) e-mail may be used without prior parental consent only to respond one time directly to the request of a child and it may not be used to recontact the child. The e-mail may not be kept or retained. Therefore newsletters and other ongoing communication can only be initiated by obtaining prior parental consent.

CME/CFA are very concerned that any uncertainty of how e-mail can be used to contact the child without verifiable prior parental consent would create a loophole that could lead to privacy invasions by marketers. For example, a marketer may solicit permission from a child to

provide 'updates' to a Web site. These 'updates' could come in the form of a flood of commercial e-mail messages enticing the child to visit the site or to buy certain products. It should be the parent's right to determine in advance whether the child should be subjected to these kinds of commercial messages. The Federal Trade Commission should be given authority to determine what defines a one-time request by a child for information. The basic thrust of this bill is to give parents of young children (under thirteen) a right to protect their children's privacy. If, however, the exceptions are too broad, the privacy safeguards for children will be seriously threatened.

**Definition of 'commercial' Web site.** CME/CFA believe that the definition of a 'commercial' Web site should be clarified so that it excludes true non-profit Web sites such as Planned Parenthood or public libraries. This legislation is intended to address the privacy concerns raised by commercial marketing sites in the online medium, which are within the jurisdiction of Federal Trade Commission regulation. The bill does not aim to burden the free flow of information on the Internet. Instead the bill will enhance the enormous educational and civic opportunities the Internet promises by reducing the threats to privacy by commercial online marketers and advertisers targeting children and youth.

**Consumer Access.** For effective consumer access, an information collector/tracker should provide a parent or guardian with the information that has been collected about her child upon request. The information must be provided within a reasonable time, at no charge, in a reasonable manner, and in a form that is readily intelligible. In addition, a parent or guardian must be able to have the data relating to her child deleted or changed.

We agree with the provision as stipulated in S. 2326. A commercial Web site operator must provide access to the actual personal information collected, not the kinds of information collected. Access must be given to the parent (for children under 13) or to the teenager (13-16) herself. Verification of identity requirements need to be determined in FTC rule making

procedures and should be based on the same requirements for prior parental consent.

Access to information collected on-line may also include access to information collected offline if the information collected online can no longer be separated from the offline information and/or if the information collected online enabled the personally identifiable enhancement of the online information with additional offline information.

CME/CFA believe that the personally identifiable information collected by marketers is still owned by the child and/or parent. It is a fundamental right of citizens in the Information Age to control the collection and use of their information. It should be the burden of the data collector to enable access to the parent or teenager.

Information collected online can be combined with personally identifiable information used offline to create complex psychographic and other profiles. (For example, Engage, a company owned by CMG Information Services, declares that its product, ProfileServer, can: “ .create[s] visitor profiles that are rich in information, extremely accurate, and current. Profiles can be determined by either demonstrated or declared interests during a site visit, or through access to our global repository of individual visitor profiles. In addition, these tools enable you to feed these profiles into your applications to deliver targeted offers, personalized pages, or profile-based advertising . . . Commerce sites can use ProfileServer for customer acquisition and increase the probability that the visitor will find and buy more products. Plus, insight into a visitor's personality and motivation affords opportunities for cross-selling and up-selling.” <sup>10</sup>

Once these profiles are created and stored electronically, a child may be stuck with this assessment of her personality for a long time, therefore limiting her opportunities as a consumer and citizen in the Information age. Moreover, the information collected may be used to exploit behavioral vulnerabilities of a young person and to manipulate her behavior. Online information which is enhanced with offline information or is subsequently inseparable from the offline information must be accessible to the parent or teenager.

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<sup>10</sup> <http://www.engage.com/products/profileserver/default.htm>

**Enforcement – Actions by States.** In addition to FTC enforcement the bill must allow State attorneys general to bring civil actions against violators of FTC regulations. Without actions by states, the FTC has exclusive authority over Web site practices. At times the FCC might not be able to act because of resources. State action provides a safeguard if the FTC is not responsive to problems.

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Though still in its early stages of development, the Internet is already becoming a powerful force in children's lives. As it matures, it is likely to become more powerful than any other medium in existence. When full motion video becomes increasingly prevalent, the online world will be particularly captivating for children, who will be easily drawn to the colorful, fun-filled, virtual playrooms, where they can interact not only with other children anywhere in the world, but also with the fictional characters that will increasingly inhabit Cyberspace.

We have a unique and unprecedented opportunity to help shape our children's electronic future. The Internet offers numerous possibilities for enhancing educational and cultural opportunities at home and in school. However, the increasing threats to privacy by online marketers are likely to undermine the potential of this new medium. Without the protection that this bill offers, threats to privacy by online advertising and marketing targeted at children and youth are likely to increase and undermine the enormous educational and civic opportunities the Internet promises.

Legislation is necessary to protect children, help parents and teachers monitor the safety of children, and assure families that the Internet can provide positive experiences without fear that children's privacy will be invaded. We believe that clear government rules must be put in place

now to protect the privacy of children on the Internet. We urge you to pass S. 2326, legislation that would give the Federal Trade Commission authority to develop flexible and effective privacy safeguards through public rule making proceedings and to enforce those rules swiftly and comprehensively.

Finally, both CME and CFA would like to underscore our commitment to see that the privacy of all consumers is protected in Cyberspace. The Federal Trade Commission survey of Web sites documented unequivocally that self-regulation has failed to provide adequate online safeguards not only for children, but for adults as well. Until there are clear and enforceable rules in place, no consumer will be safe from threats to privacy in electronic commerce. Government clearly has a major role to play in protecting privacy in the interactive media. Privacy, after all, is a fundamental human right for all citizens. Accordingly, we urge this committee to develop legislation which directs the Federal Trade Commission to mandate rules for protecting everyone's privacy on the Internet.

The Center for Media Education and Consumer Federation of America look forward to working together with this Committee to build a solid foundation for a healthy, democratic, and safe communications system for future generations.